92-1730

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,

v.

MARCOS CRUZ-MENDOZA, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SALESE & McCARTHY, P.C.

Armand Salese

ARMAND SALESE
130 W. CUSHING STREET
TUCSON, ARIZONA 85701
(602) 623-0341

QUESTION PRESENTED

If an indictment charges a conspiracy to distribute cocaine between two distinct dates, and the defendant's defense is that he lacked the requisite specific intent because he only pretended to agree to distribute cocaine during said period as a ruse to keep the buyers interests contingent on his possible future acquisition of cocaine, is he entitled to "theory of defense" instruction?

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FORWARD

Citations to materials in the district court record on appeal are denoted "C.R." and the page number in the district court record where the cited materials appear. Citations to materials in the trial transcript are denoted by the notation "R.T." and the volume date and page number where the cited materials appear.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, p. 36) is unreported.

JURISDICTION

The memorandum opinion of the court of appeals was filed on November 2, 1992. Petitioner filed a Petition for Review on November 16, 1992. On January 6, 1993, the petition for rehearing was denied. (App., infra, p. 35) On January 25, 1993, judgement was entered in the court of appeals and on February 1, 1993, judgement was filed with the district court (App., infra, p. 33).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Title 21, United States Code, Section 845 which states as follows:

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

This case involves Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A)(ii)(II), and 841(b)(1)(B)(ii)(II). The applicable parts of which state:

Prohibited acts A

Unlawful acts

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving --

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of --

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(B) In the case of a violation of subsection (a) of this section involving --

(ii) 500 grams or more of a mixture or substance containing a detectable amount

of --

> (II) cocaine, its salts, optical and geometric isomers, and salts of isomers."

STATEMENT OF THE CASE

On November 14, 1990, Petitioner Marcos Cruz-Mendoza, was named in two counts of a federal indictment in the District of Arizona. Count 1 charged that Petitioner and three others, Oscar Barnett-Inclan, Basilio Angulo-Ruiz, and Samuel Ortiz-Espinoza, conspired on or about September 26, 1990 to and including October 11, 1990, to possess with intent to distribute 5 kilograms or more of cocaine. Count 2 charged that on September 26, 1990, Petitioner and the same three codefendants named in Count 1 possessed with intent to distribute 500 grams or more but less than 5 kilograms of cocaine (App, infra, p. 65). Petitioner was

convicted after trial on both counts and on July 9, 1991, was sentenced to nineteen and one half years (235 months) in prison (C.R. 161-163, 165, 273).

The events which lead up to the indictment began on September 26, 1990, when undercover DEA Agent, Ronald Moore and an informant met at the Saguaro Crest Apartments in Tucson, Arizona, with co-defendants Oscar Barnett-Inclan, Basilio Angulo-Ruiz and Samuel Ortiz-Espinoza. During that meeting, Agent Moore negotiated for the purchase of one kilo gram of cocaine with Basilio Angulo-Ruiz. Agent Moore purchased the cocaine and paid $24,000.00 in cash. Agent Moore and Angulo-Ruiz discussed the possible purchase of larger quantities of cocaine in the future (R.T. March 6, 1991, pp. 35-42).

Later, the same afternoon, undercover

agent Moore and Thomas met with Angulo-Ruiz and asked if they could purchase another kilo of cocaine. Angulo-Ruiz indicated he could obtain another kilo of cocaine and a meeting was arranged for later that day and another kilo of cocaine was sold to the undercover agents for $24,000.00 in cash (R.T. March 6, 1991, pp. 44-49).

On September 28, 1990, Agent Moore talked with Angulo-Ruiz, by telephone, about the possibility of purchasing larger quantities of cocaine. Several telephone conversations were held over the next few days in an attempt to arrange a meeting to discuss additional purchases of cocaine (*Id.* at pp. 51-55).

On October 5, 1990, undercover agents Moore and Thomas met at a restaurant in Tucson, Arizona with Basilio Angulo-Ruiz and Oscar Barnett-Inclan. At this

meeting, the undercover agents indicated that they wished to purchase 75 kilos of cocaine. The agents said that they could put the money together for the purchase some time later in the week and were left with the understanding that the transaction would be completed at Barnett-Inclan's house in Tucson. Later that day, the agents were taken to Barnett-Inclan's house and discussed the proposed transaction further. The agents were asked by Angulo-Ruiz and Barnett-Inclan whether they wished to do the deal all at once or over a period of time in smaller quantities. The agents told them that the transaction had to occur all at once to minimize the risk. Barnett-Inclan informed the agents that if the deal was to be done all at once, it would be done at his house; however, if his people wanted to do it in 10 kilo increments, it

would have to be done in Phoenix and over a period of time because they did not want to risk losing 75 kilos at one time. Another meeting was arranged for later in the week to continue the discussions. (*Id.* pp. 57-64).

The next contact occurred on October 10, 1990. Agent Moore called Angulo-Ruiz who told him to go over to the Saguaro Crest Apartments. The agents went to the apartment at approximately 1:50 p.m. and met with Angulo-Ruiz. Angulo-Ruiz informed them that the owners of the cocaine would not transfer the entire amount at one time. The agents explained that they wanted to do the entire transaction at one time. Angulo-Ruiz indicated that although he trusted the agents, he would have to talk to his people to see if the deal could be arranged the way they wanted. Angulo-Ruiz indicated he would page them

after he talked with his people. At approximately 4:30 p.m. that afternoon, the undercover agents received a page and were asked to come back over the apartment by Angulo-Ruiz (*Id.*. at pp. 65-67).

When the agents arrived at the apartment, Angulo-Ruiz and Ortiz-Espinoza were present. Angulo-Ruiz took the agents into the bedroom and told them that the owners of the cocaine proposed two options for completing the transaction. The first was that the cocaine would be delivered in 10 kilo increments over a period of time and the second option was that the sale of the entire amount would occur at one time but that Angulo-Ruiz would stay with the money that was going to be used to purchase the cocaine and that the undercover agents would go to Oscar Barnett-Inclan's house and after the agents received the cocaine, Barnett-

Inclan would then place a call to Ortiz-Espinoza who would be at the apartment and would call Angulo-Ruiz and each side could leave with the cocaine and money. That meeting broke up at approximately 5:00 p.m. and the agents left the apartment. At approximately 5:40 p.m., the agents called the apartment and spoke with Angulo-Ruiz and told him that they needed to talk and went over to the apartment again (*Id.* pp. 68-70).

When the agents arrived at the apartment, Angulo-Ruiz again took them to the bedroom whereupon the agents explained that they were willing to go with the second option. The agents also informed Angulo-Ruiz that they wanted to purchase 105 kilos of cocaine. Approximately 10 minutes after the agents arrived, Ortiz-Espinoza, Barnett-Inclan and Petitioner arrived at the apartment (*Id.* at pp. 70-

71).

According to the agents, Angulo-Ruiz asked agent Moore to tell Petitioner, Barnett-Inclan and Ortiz-Espinoza what he had told him about taking the second option. Agent Moore testified that Petitioner asked him why his people did not want to go with the first option which was delivery in 10 kilo increments. Moore testified that his people had the capability of moving large quantities of cocaine at one time and that if it were moved in 10 kilo increments, there was too much risk of being caught by the police. There was some discussion about fronting a few kilos to the agent and it was then arranged that the transaction would take place the next morning, October 11, 1990 (*Id.* at pp. 72-76).

On October 11, 1990, Agent Moore spoke with Angulo-Ruiz who told him that

the deal was not going to go down because the owner of the cocaine felt that there might be some police surveillance and did not want to go through with the transaction. Angulo-Ruiz went on to say that he and Barnett-Inclan and the Petitioner went to the owners of the cocaine on the evening of October 10, 1990, to try to get them to go through with the 110 kilo cocaine transaction but the owners refused to do so (*Id.* at pp. 80-81). Petitioner, Cruz, had no further contacts with undercover agents; however, the other co-defendants continued to negotiate with undercover agents.

At trial, co-defendant Oscar Barnett-Inclan testified for Petitioner. Barnett-Inclan testified that he and Angulo-Ruiz obtained the cocaine that they sold to the undercover agents from a third party, not Petitioner. He testified that Petitioner

had nothing to do with the 2 kilos of cocaine that had been sold to the undercover agents on September 26, 1990. He further testified that the deal that had been discussed on October 10, 1990, for the sale of 110 kilos of cocaine to occur on October 11 was a ruse. Barnett-Inclan testified that he and Angulo-Ruiz did not have 110 kilos of cocaine, that they did not intend to sell 110 kilos of cocaine to the agents on October 11th but were merely stringing them along so that they would not lose them as prospective purchasers (R.T. Vol. 2, March 7, 1991, at pp. 15-20). Petitioner submitted the following jury instructions on his theory of defense:

> "You have heard evidence that Oscar Barnett-Inclan, Basilio Angulo-Ruiz and Samuel Ortiz-Espinoza, alleged co-conspirators of Defendant Marcos Cruz did not intend to sell 110 kilos of cocaine to undercover

officers on October 11. If you so find, you must acquit Defendant Marcos Cruz of conspiring to sell 5 kilograms or more of cocaine as charged in Count 1 of the Indictment." (Defendant's Supplemental Jury Instruction Number 2)

"You have heard evidence that Oscar Barnett-Inclan, Basilio Angulo-Ruiz and Samuel Ortiz-Espinoza were not in possession of 110 kilos of cocaine on or about October 10 or 11, 1990, and never intended to sell 110 kilos of cocaine to undercover officers on October 11, 1990. If you so find, then you must acquit Defendant Marcos Cruz of conspiring to sell 5 kilograms of cocaine or more as charged in Count 1 of the Indictment." (Defendant's Supplemental Jury Instruction Number 3.)

"Count 1 of the Indictment charges Defendant Marcos Cruz-Meza with conspiracy to sell five (5) kilograms or more of cocaine. The government must prove beyond a reasonable doubt that Mr. Cruz specifically intended to sell more than five (5) kilograms of cocaine to the officers on or about October 11, 1990." (Defendant's Supplemental Jury Instruction Number 9.)

(C.R. 162).

Jury instructions were argued at the close of evidence and Petitioner urged the court to give one of his "theory of defense" instructions. The court refused to give the instructions but allowed counsel to argue the theory (R.T., March 7, 1991, at 77-78). Before closing argument, Petitioner argued that the court's instructions would confuse the jury and make Petitioner's argument that there was no intent to sell 110 kilos nor ability to sell 110 kilos on October 11, 1990, meaningless. (*Id.* at 81-84).

In his appeal, Petitioner argued that the trial court erred in not giving his "theory of defense" instruction. In its decision, the court of appeals held that Petitioner was not entitled to the instruction:

> "Cruz's defense was not that he planned to dupe his buyers out of their cash payment; rather,

> his evidence was that the "ruse" consisted at most of an attempt to delay the sale until the conspirators gained access to the cocaine. Barnett testified that the conspirators did not intend to sell cocaine on October 11, and that it was Angulo's intent to 'hold [the agents] up a little bit longer here in town in order to wait for [the cocaine] to arrive.'
>
> The 'ruse' defense offered by Cruz is not a defense at law. The district court was not required to give instructions intended to implement that theory of the defense." (*Id.*, pps. 40-42).

The court of appeals then went on to hold that even if Petitioner were entitled to a "ruse" instruction, his appeal would fail because his proposed instructions would "...improperly preclude the jury from concluding that a conspiracy to sell the drugs at some future time existed." (App., infra at p. 43).

REASONS FOR GRANTING THE WRIT

Although Petitioner presented

evidence at trial that he and his co-defendants did not intend to sell over five kilograms of cocaine within the dates charged in the indictment, the court of appeals sanctioned the district court's refusal to give a jury instruction on his theory of defense.

The court of appeals decision in this case is contrary to to this Court's decision holding that a defendant is entitled to an instruction as to any recognized defense for which there exists any foundation in the evidence. The decision is also at odds with the law of every other circuit.

The question of whether a defendant is entitled to an instruction on his theory of defense--lack of intent--in a conspiracy prosecution for the distribution of narcotics is of considerable practical importance where no

drugs are actually distributed. Petitioner is presently serving a nineteen and one half year sentence for saying he would distribute drugs that were never distributed.

1. This Court and every other circuit court, including the Ninth Circuit until this decision, has held that a defendant is entitled to an instruction on his theory of defense if it is one recognized at law and for which there is any foundation in the evidence. *Mathews v. U.S.*, 108 S.Ct. 883, 485 U.S. 58, 99 L.Ed.2d 54 (1988); *U.S. v. Panet-Collazo*, 960 F.2d 256 (1st Cir. 1992); *U.S. v. Goldson*, 954 F.2d 51 (2d Cir. 1992); *U.S. v. Paolello*, 951 F.2d 537 (3rd Cir. 1991); *U.S. v. Fowler*, 932 F.2d 306 (4th Cir. 1991); *U.S. v. Barnell*, 945 F.2d 1296 (5th Cir. 1991); *U.S. v. Hurst*, 951 F.2d 1490 (6th Cir. 1991); *U.S. v. Jungles*, 903 F.2d

468 (7th Cir. 1990); *U.S. v. Feldhacker*, 820 F.2d 279 (8th Cir. 1987); *U.S. v. Wellington*, 754 F.2d 1456 (9th Cir. 1985); *U.S. v. Scafe*, 822 F.2d 928 (10th Cir. 1987); *U.S. v. Opdahl*, 930 F.2d 1530 (11th Cir.).

A defendant is entitled to an instruction relating to his theory of defense even though the evidence is weak, insufficient, inconsistent or of doubtful credibility. *Tatum v. U.S.*, 190 F.2d 612 (D.C. 1951). It is not enough to allow counsel to argue in summation defendant's theory of defense; he is entitled to an instruction. *U.S. v. Durham*, 825 F.2d 716, 719 (2nd Cir. 1987).

The court of appeals disagreed holding that Petitioner was not entitled to his theory of defense instruction because "The 'ruse' defense offered by Cruz is not a defense at law." (App.

infra, p. 41). The court of appeals reasoned that petitioner was not attempting "...to dupe his buyers out of their cash payment; rather, his eveidence was that the "ruse" consisted at most of an attempt to delay the sale until the conspirators gained access to the cocaine." (App., infra, p. 41). The indictment charged Petitioner with a conspiracy to distribute over 5 kilograms of cocaine between September 26, 1990 to and including October 11, 1990. If he did not intend to distribute over 5 kilograms of cocaine during that period, for whatever reason, he could not be be guilty of the offense as charged. A drug conspiracy charge is a specific intent crime. *U.S. v. Burroughs*, 876 F.2d 366, 368-69 (5th Cir. 1989). If Petitioner and his co-defendants didn't intend to sell 110 kilograms of cocaine during the period

charged in the indictment because they didn't have it to sell, they lack the specific intent required for conviction.

A conspiracy requires that its members must actually understand that a specific crime will be committed and desire that it be committed. *United States v. Sangmeister*, 685 F.2d 1124, 1126 (9th Cir. 1982).

> "Since the act of agreeing is a group act, unless at least two people commit it, no one does. When one of two persons merely pretends to agree, the other party whatever he may believe, is in fact not conspiring with anyone." *United States v. Escobar De Bright*, 742 F.2d 1196, at 1199 (9th Cir. 1984).

The government's indictment charged the Petitioner with conspiring to distribute more than 5 kilograms of cocaine "...on or about September 26, 1990 to and including October 11, 1990." In support of that charge, it presented

evidence of a meeting on October 10, 1990, where Petitioner, his codefendants and the undercover agents agreed to distribute 110 kilograms of cocaine on October 11, 1990. Petitioner presented evidence at trial that his coconspirators did not have the 110 kilograms of cocaine to sell and where only pretending to negotiate a sale on the October 10, to occur on the 11th, as a ruse to stall the "buyer" until they could obtain a supply of cocaine to sell. No cocaine was delivered on October 11, 1990, the last day of the conspiracy alleged in the indictment.

In a similar case where defendants claimed they did not specifically intend to commit the crime charged, the district court also refused to give a theory of defense instruction. *U.S. v. Durham*, 825 F.2d 716 (2nd Cir. 1987). In *Durham*, defendants were charged with conspiracy to

maliciously damage by means of fire a building in violation of 18 U.S.C. § 371. The defendants contended that although they met with undercover agents and agreed to burn the building in question for a total of $7,000.00, $2,000.00 up front and $5,000.00 upon completion of the job, there was never any intention on their part to burn the building, but rather to "dupe" the agents out of the $2,000.00. The defendants requested that the court instruct the jury as follows:

> "You have heard evidence that defendants intended to dupe the agents and never, in fact, to burn the Main Bar and Grill. If you so find, then you must acquit them both of the attempt to commit arson and of conspiracy to commit arson."

The trial court denied the requested instruction. *Id.* at p. 718. The circuit court overturned the conviction noting that "a criminal defendant is entitled to

have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible the evidence may be." *Durham*, at p. 719. Further, the court noted that counsel's summations are not adequate to inform a jury of what it should consider a legally valid defense." *Durham* at p. 719.

Similarly, in *U.S. v. Brown*, 544 F.2d 1155 (2nd Cir. 1976), defendant was charged, *inter alia*, with conspiring to violate the federal narcotics laws. Defendant had been introduced to an undercover agent by an old friend and helped them purchase approximately one (1) ounce of heroin. The undercover agent and friend later returned to the defendant suggesting that the amount of heroin was less than as represented and sought to

obtain another quantity of heroin. The first sale occurred on January 14 and a second sale was to have occurred on January 23. At trial, defendant argued that he was entrapped into the first sale and that when approached to make a second sale, he only "played along" until he could leave town. The court observed that the defendant was asserting two defenses: one of entrapment and the other lack of intent. As such, defendant was entitled to "request the charge spelling out both defenses to the conspiracy count." *Brown, supra.* at p. 1159. Lack of intent to commit the underlying crime of the conspiracy is a defense at law.

2. The court of appeals was clearly uncomfortable with its conclusion that Petitioner's "ruse" defense was not recognized at law: "Moreover, even if Cruz were entitled to "ruse" instructions, his

appeal would fail." (App., infra, p. 41). The court reasoned that the theory of defense instructions offered by Petitioner "...improperly narrowed the range of circumstances in which the jury could return a verdict of guilty...The two proposed jury instructions do not address the issue of whether the conspiracy involved an agreement to sell the cocaine on some other date, and they improperly preclude the jury from concluding that a conspiracy to sell the drugs at some future time existed." (App., infra, p. 44). The indictment charges the crime. It was drafted by the government.

The government presented evidence that the agreement to distribute over 5 kilograms of cocaine was finalized on October 10, 1990, to be executed on October 11, 1990. The Petitioner was not charged with ditributing cocaine at any

other times. The charge is limited by the terms of the indictment. Testimony cannot extend the scope of the indictment. *Terry v. U.S.*, 7 F.2d 28, 29-30 (9th Cir. 1925).

In *Terry*, defendants were charged with conspiring on or about November 1, 1923, at or near Allen's Wharf, to violate the National Prohibition Act. At trial evidence was admitted regarding delivery of several barrels of liquor to Bodega Bay six weeks before November 1, 1923. The court instructed the jury that it could consider what occured at Allen's Wharf on November 1, and the Bodega Bay incident to determine if a conspiracy to violate the prohibition laws occured. *Id.*, at page 29. On appeal, the appellants argued that the indictment limited the charge to the November 1 incident at Allen's Wharf. The Ninth Circuit agreed and held that a

charge is limited by the terms of the indictment and reversed. *Id.*, page 29-30.

The trial court's refusal to give Petitioner's theory of defense instruction couple with the instruction it did give had the effect of allowing the jury to consider a charged not included in count 1 of the indictment.

The instruction the court gave read, in part, as follows:

> "For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways or perhaps helped on another. <u>You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.</u>" [Emphasis added] (C.R. 180 at p. 8)

The jury could, therefore, find Petitioner guilty of the conspiracy by

concluding that the Petitioner and the others planned to commit the crime charged in Count Two, possession of less than five kilos of cocaine while at the same time finding that the conspirators never intended to sell the 110 kilos on October 11, 1990 -- the crime charged in Count One of the Indictment. Without the Appellant's requested instruction, he was without a defense. As the Ninth Circuit has said:

> "The right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. Jurors are required to apply the law as it is explained to them in the instructions they are given by the trial judge. They are not free to conjure up the law for themselves. Thus, a failure to instruct the jury regarding the defendant's theory of the case precludes the jury from considering the defendant's defense to the charge against

> him. Permitting a defendant to offer a defense is of little value if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal." *United States v. Escobar DeBright*, *supra*, 742 F.2d at pp. 1201, 1202.

The court of appeals would not limit the jury's consideration to the crime charged in Count I of the indictment. The jury was permitted to consider the allegatoins in Count II and crimes which occurred beyond October 11, 1990, while precluding the Petitioner any opportunity to present his defense to the jury.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certioari should be granted.

Respectfully submitted.

SALESE & McCARTHY, P.C.

Armand Salese

Armand Salese
130 W. Cushing Street
Tucson, Arizona 85701
(602) 623-0341

April 1993

APPENDIX A

FILED WITH
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2-1-93

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-10372
CT/AG#: CR-90-00428-RMB

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

MARCOS CRUZ-MENDOZA

Defendant - Appellant

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the

Transcript of the Records from the United States District Court for the District of Arizona (Tucson)
and was duly submitted

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 11/2/92.

FILED WITH
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APPEALS ON
1-25-93

APPENDIX B

FILED WITH
COURT OF
APPEALS ON
1-6-93

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 91-10372
Plaintiff-Appellee,	D.C. No. CR-90-00428-RMB
v.	
MARCOS CRUZ-MENDOZA,	
Defendant-Appellant.	

BEFORE: CANBY, REINHARDT, and LEAVY, Circuit Judges

Appellant's petition for rehearing is denied.

APPENDIX C

FILED WITH
COURT OF
APPEALS ON
11-2-92

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 91-10253
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-90-0428-RMB
	)	
v.	)	MEMORANDUM*
	)	
BASILLIO ANGULO-RUIZ,	)	
	)	
Defendant-Appellant.	)	
	)	
	)	
UNITED STATES OF AMERICA,	)	NO. 91-10372
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-90-0428-RMB
	)	
v.	)	
	)	
MARCOS CRUZ-MENDOZA,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District
Court for the District of Arizona
(Tucson)

Richard M. Bilby, District Judge, Presiding

Submitted July 22, 1992**
San Francisco, California

Before: CANBY, REINHARDT, and LEAVY, Circuit Judges.

Undercover DEA agents in Tucson, Arizona entered into negotiations with Basilio Angulo-Ruiz [Angulo], Marcos Cruz-Mendoza [Cruz], and two other men for the sale of 110 kilograms of cocaine. During the early conversations, agents purchased two kilos of sample cocaine from the defendants. Subsequently, police arrested the man who was delivering the 110 kilos to the officers. After the arrest,

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App. P. 34(a) and Ninth Circuit Rule 34-4.

officers conducted a warrantless search ofa suspected stash house, which uncovered approximately 600 kilograms of cocaine.

Angulo pled guilty to one count of conspiracy to possess with intent to distribute five or more kilograms of cocaine. He appeals his sentence of 235 months imprisonment. Cruz was charged and convicted of conspiring to distribute more than five kilograms of cocaine and with possession with intent to distribute 500 grams or more but less than five kilograms of cocaine. He appeals his conviction on the ground that the judge improperly instructed the jury. He also appeals his sentence of 235 months imprisonment. We affirm.

Angulo-Ruiz

We decline to reach the merits of Angulo-Ruiz's claims because we find that

he waived his right to appeal. In United States v. Bolinger, 940 F.2d 478 (9th Cir. 1991), we held:

> There is no constitutional right to appeal. Jones v. Barnes, 463 U.S. 745, 751 (1983). The right is purely statutory. Abney v. United States, 431 U.S. 651, 656 (1977). We have held that an express waiver of the right to appeal in a negotiated plea of guilty is valid if knowingly and voluntarily made. United States v. Navarro-Botello, 912 F.2d 318, 320 (9th Cir.), cert. denied, - U.S. -, 112 S. Ct. 1488 (1992).

Id. at 480. The plea bargain agreement accepted by Angulo required him to waive his right to appeal, and he did so. Angulo's counsel does not argue on appeal that the waiver was not knowingly and voluntarily made.[1] The 235-month sentence

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[1] In response to our order for supplemental briefing on the waiver issue, Angulo's appellate counsel (the same attorney who represented Angulo at trial) stated only that "[a]fter careful consideration, it appears that have fallen to the level of ineffective

imposed on Angulo was within the plea agreement range of 120 to 235 months. Accordingly, we do not consider his appeal on the merits.

Cruz Mendoza

Cruz raises four contentions on appeal. First, he argues that the trial court erred by refusing to give his requested jury instructions regarding his defense that he participated in the conspiracy regarding the intended 100-kilo sale only as a "ruse." A criminal defendant is entitled to an instruction covering a theory of defense if it has a basis in law and there is some foundation

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assistance of counsel. As such, it would be improper for appellate counsel to make any further argument [on the waiver issue]." Appellant's Reply Brief at 2-3. However, counsel points to no facts supporting his conclusion and our own review of the record reveals none that on their face would do so.

for it in the evidence. See United States v. Tabacca, 924 F.2d 906, 912 (9th Cir. 1991); United Sates v. Ibarra-Alcarez, 830 F.2d 968, 973 (9th Cir. 1987).

Cruz's defense was not that he planned to dupe his buyers out of their cash payment; rather, his evidence was that the "ruse" consisted at most of an attempt to delay the sale until the conspirator gained access to the cocaine. Barnett testified that the conspirators did not intend to sell cocaine on October 11, and that it was Angulo's intent to "hold [the agents] up a little bit longer here in town in order to wait for [the cocaine] to arrive."

The "ruse" defense offered by Cruz is not a defense at law. The district court was not required to give instructions intended to implement that theory of the defense. Moreover, even if Cruz were

entitled to "ruse" instructions, his appeal would fail.

Cruz proposed three instructions that he claimed incorporated his "ruse" theory of defense; however, two of the instructions improperly narrowed the range of circumstances in which the jury could return a verdict of guilty. Count 1 of the indictment stated that "on or about September 26, 1990 to and including October 11, 1990 . . . [the four defendants] . . . did knowingly and intentionally combine, conspire, confederate, and agree together and with each other . . . to possess with intent to distribute a quantity of cocaine . . . of 5 kilograms or more." The indictment asserted that the conspiracy to possess with intent to distribute the cocaine took place on and prior to October 11 -- not that the sale was intended to take place

during that period. Cruz's jury instructions substantially misstated the indictment's temporal framework by stating that the government must prove that the conspirators intended to sell cocaine on October 11th. Proposed instruction 2 states that if the jury finds the defendants did not intend to sell 110 kilos of cocaine on October 11th, Cruz should be acquitted of Count 1. Proposed instruction 3 similarly states:

> You have heard evidence that [the conspirators] were not in possession of 110 kilos of cocaine on or about October 10 or 11, 1909 and never intended to sell 110 kilos of cocaine to undercover officers on October 11, 1990 . . . If you so find, then you must acquit [Cruz] of conspiring to sell five kilograms of cocaine or more. (emphasis added)

The district court refused to give these instructions but allowed the defense to argue the theory that if defendants

knew they would not be able to deliver the cocaine on the 11th, they could not have agreed to deliver the cocaine on that date. That defense is incomplete and does not purport to go nearly as far as the argument presented in Cruz's proposed jury instructions: that Cruz must be acquitted if he did not intend to make the sale on a particular date. The two proposed jury instructions do not address the issue of whether the conspiracy involved an agreement to sell the cocaine on some other date, and they improperly preclude the jury from concluding that a conspiracy to sell the drugs at some future time existed.

The other instruction requested by Cruz, to the extent that it did not contain the same deficiency as his first two proposed instructions, was essentially given to the jury, albeit in a somewhat

different form. Judge Bilby instructed the jury that, in order to find that a conspiracy existed, they "must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy." In addition, he explained that, in order for Cruz to be found guilty of possession of cocaine with intent to distribute, the government must prove beyond a reasonable doubt that he knowingly possessed cocaine "with the intent to deliver it to another person." Those instructions, though more general than Cruz's proposed instruction 9 (and more generous to him in some respects), served the same general purpose.[2] Cruz

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[2] Cruz's proposed instruction reads, "[t]he government must prove beyond a reasonable doubt that Mr. Cruz specifically intended to sell more than five (5) kilograms of cocaine to the officers on or about October 11, 1990." While the court's instruction failed to mention the five (5) kilogram threshhold

was not entitled to craft the specific language of his instruction. See United States v. Faust, 850 F.2d 575, 583 (9th Cir. 1988). Two of Cruz's proposed instructions did not focus on the alleged agreement as a whole and erroneously looked at the date of the sale as a condition of the conspiracy. The other was adequately conveyed by Judge Bilby's general instructions to the jury. Moreover, had defendant's third instruction been given to the jury rather than the court's, Cruz most likely would not have benefited. Any error regarding failure to give that instruction was harmless. The district court, therefore, did not commit reversible error by

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specifically, Cruz's objection is not based on that omission. Moreover, the instructions read as a whole were sufficient to inform a jury in that regard.

refusing the proposed instructions.

Second, Cruz argues that the trial court's jury instructions regarding the liability of co-conspirators for each other's criminal acts constituted reversible error.[3] On the second day of deliberations, the jury sent a note to the court. Judge Browning was standing in for Judge Bilby, and he responded tc the jury's question about the connection between the conspiracies outlined in Counts 1 and 2 in a manner that conflicted with Judge Bilby's original Pinkerton instruction. When the jury sent additional questions to Judge Browning, he dismissed the jurors until Judge Bilby's

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[3] Although Cruz objected to the original Pinkerton instruction, he did so only on the ground that count one alleged a conspiracy to distribute more than five kilogram of cocaine and count two involved the possession of less than five kilograms.

return, explaining that "Judge Bilby is going to be in a much better position to answer these questions for you than I am."

Upon Judge Bilby's return, he recognized that Judge Browning's answer had created a conflict with his own earlier instructions, and he responded to the jury's remaining questions in a manner consistent with his original instruction. Cruz asserts that the inconsistencies between the two judges' responses constitute reversible error because the jury was confused about the applicable law. In fact, as the district court recognized, Judge Browning's misleading instruction benefitted the defendant, and certainly did not unfairly prejudice the jury against Cruz. In addition, Cruz does not contend that Judge Bilby's instructions were misleading, incorrect, or ambiguous. Cruz cites no authority for

his contention that a criminal defendant is entitled to have a jury "free of confusion as to the law it must apply to the facts" when the confusion could only benefit him, and we see no reason to adopt so inflexible a rule. Finally, Cruz did not object below to either Judge Bilby or Judge Browning's instructions, and any error that may have occurred was not "plain error".

Cruz's third contention is that the trial court committed reversible error with regard to (1) the admission of certain testimony by Barnett and (2) the jury instruction concerning that testimony. Barnett testified as a defense witness at Cruz's trial to support Cruz's claim that his participation in the 110-kilo deal was designed merely to persuade the purchaser to agree to delay the transaction and not to assist in its

completion. In the process, Cruz's attorney asked Barnett about Barnett's previous plea. Barnett testified that he had pled guilty. The prosecutor pursued this line of questioning of cross-examination by asking Barnett about the nature of the charges to which he had plead guilty. Because the defense raised the issue first, and did not object at trial to the prosecutor's questions concerning Barnett's involvement in the conspiracy, we reject Cruz's complaint with respect to the admission of the testimony. See United States v. Williams, 939 F.2d 721, 723 (9th Cir. 1991).

Cruz further argues that the judge failed adequately to explain that Barnett's plea of guilty to the conspiracy charge did not constitute evidence against Cruz and that Cruz's case must be determined solely on the basis of evidence

relating to his guilt or innocence. Cruz suggested the following instruction:

> The fact that the co-defendant pleads guilty is not evidence of guilt of any other defendant, or that the crime charged in the indictment was committed. The guilt or innocence of the defendant that is still on trial must be determined by the jury solely by the evidence introduced in the trial of this case.

A defendant is "not entitled to any particular form of an instruction so long as the instructions given fairly and adequately covers his theories of defense." Faust, 850 F.2d at 583. The trial court has broad discretion in fashioning the precise language of the instruction, and a conviction will only be overturned if the instruction's imperfections constitute an abuse of discretion. See id.; United States v. Hayes, 794 F.2d 1348, 1351 (9th Cir. 1986), cert. denied, 479 U.S. 1086 (1987).

Judge Bilby charged the jury as follows:

> The witness, Oscar Barnett-Inclan, has pleaded guilty to a crime arising out of the same events for which the defendant is on trial. This guilty plea is not evidence against the defendant, and you may consider it only in determining this witness' believability. You should consider this witness' testimony with great caution, giving it the weight you feel it deserves.

The trial court's instruction to the jury adequately cautioned the jury about Barnett's credibility as a witness. As we concluded in United States v. Sai Keung Wong, 886 F.2d 252 (9th Cir. 1989), "[t]he failure to give a perjury instruction is not reversible where the other instructions given by the trial court adequately cautioned the jury that the credibility [of the perjurer] is open to question." Id. at 257. The instruction also explained sufficiently that Barnett's guilty plea did not constitute evidence

against Cruz. There was no error in the challenged jury instruction.

Finally, Cruz appeals his sentence. First, he contends that the court incorrectly calculated his base offense level by relying on the two kilo sales and the negotiated deal for 110 kilograms. "If a defendant is convicted of a conspiracy . . . involving a controlled substance, the offense level shall be the same as if the object of the conspiracy . . . had been completed." U.S.S.G. § 2D1.4(a) (Nov. 1, 1990). The accompanying commentary states:

> [W]here the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing.

Comment n. 1. Whether a defendant is

reasonably capable of producing the negotiated amount is a factual conclusion and is reviewed for clear error. United States v. Monroe, 943 F.2d 1007, 1019 (9th Cir. 1991), cert. denied, 112 S.Ct. 1585 (1992). Although Cruz claims that he was never in a position to deliver 110 kilograms of cocaine to undercover agents, the jury found him guilty of the conspiracy charge. The trial court was entitled to reject the defendant's argument regarding his limited participation in the cocaine sales, his suggestion that the large transaction was a hoax, and his contention that he could never have produced the drugs. Because there was ample evidence that Cruz did, in fact, conspire with others to sell 110 kilograms, the trial court did not err in calculating his base offense level at 36.

Cruz also argues that his four prior

convictions for driving under the influence of alcohol -- three of which occurred almost ten years ago -- overrepresent his criminal history. Cruz does not argue that the trial court's determination of his criminal history is incorrect per se; he contends instead that the court should have exercised its discretionary authority to depart downward because his prior convictions do not actually reflect "the seriousness of [his] past criminal conduct or the likelihood that [he] will commit other crimes." U.S.S.G. § 4A1.3 at 4.9. The commentary for this section provides that a downward departure may be warranted when a defendant has "two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period." Id. at 4.10.

Under our decision in United States v. Williams, 898 F.2d 1400 (9th Cir. 1990), if the district court exercises its discretion in deciding that a downward departure is not warranted, we have no jurisdiction to review its decision. Id. at 1403. The record indicates that the sentencing judge considered the implications of Cruz's criminal history category. He stated:

> I think under these facts his criminal history . . . substantially overstates it. [It] would be one thing if he had a criminal history consisting of some felonies or some drug-related offenses, but he's just got a drinking problem . . . I don't think that really would move him to a criminal history category three . . . And in mitigation, I think it's also unfair to overstate the criminal history category.

Judge Bilby acknowledged that "the question is whether or not the sentence should be enhanced in essence because --

it could be enhanced almost six to eight years, depending on what category you look at." Despite his concern, however, Judge Bilby decided not to depart from the guidelines in determining Cruz's criminal history category or his sentence. He stated, "There will be no departures. The sentence imposed -- I'm going to sentence him at the level of his coconspirators because I feel that's the only fair thing to do under the circumstances, as severe as that may be." Although Judge Bilby was apparently somewhat disturbed by the severity of the sentence that resulted from placing Cruz in criminal history category three, he was aware that he could exercise his discretion to depart downward and made a considered decision not to. For this reason, we do not have jurisdiction to review this aspect of Cruz's sentence.

Accordingly, we uphold Cruz's conviction and sentence.

AFFIRMED.

APPENDIX D

CRIME CHARGED

COUNT I

The defendant is charged in this count with conspiracy to distribute cocaine. In order for the defendant to be found guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt;

First, on or about September 26, 1990, to and including October 11, 1990, there was an agreement between two or more persons to distribute cocaine, as charged in the indictment;

Second, the defendant became a member of the charged conspiracy knowing of at least one of its objects and intending to help accomplish it.

I shall discuss with you briefly the law relating to each of these elements.

A conspiracy is a kind of criminal partnership -- an agreement of two or more persons to commit one or more crimes. The crime is the agreement to do something unlawful; it does not matter whether the crime agreed upon was committed.

For a conspiracy to have existed, it is not necessary that the conspirators made a formal agreement or that they agreed on every detail of the conspiracy. It is not enough, however, that they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another. You must find that there was a plan to commit at least one of the crimes alleged in the indictment as an object of the conspiracy.

One becomes a member of a conspiracy by willfully participating in the unlawful

plan with the intent to advance or further some object or purpose of the conspiracy, even though the person does not have full knowledge of all the details of the conspiracy. Furthermore, one who willfully joins an existing conspiracy is charged with the same responsibility as if that person had been one of the originators of it. On the other hand, one who had no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a member merely by associating with one or more persons who are conspirators, nor merely by knowing of the existence of a conspiracy.

COUNT II

In order for the defendant to be found guilty of Possession of Cocaine with

the Intent to Distribute, the government must prove the following two things beyond a reasonable doubt:

First, the defendant knowingly possessed cocaine, and

Second, he possessed it with the intent to deliver it to another person.

It does not matter whether the defendant knew that the substance was cocaine. It is sufficient that he knew that it was some kind of controlled substance, that is, a prohibited drug.

Possession means having physical control of a thing. That control may be direct, as by actually holding a thing, or indirect, by having the power to control the thing while someone else may actually be holding it. The jury may find possession where one person alone has possession or where that person shares control with other persons.

Each member of a conspiracy is responsible for the actions of other members performed during the course and in furtherance of the conspiracy. If one member of a conspiracy commits a crime in furtherance of a conspiracy, the other members have also, under the law, committed the crime. Therefore, you may find the defendant guilty of Possession with the Intent to Distribute Cocaine as charged in Count II of the indictment if the government has proved each of the following elements beyond a reasonable doubt:

First, a person(s) named in Count II (Oscar Barnett-Inclan, Basilio Angulo-Ruiz and Samuel Ortiz Espinosa) of the indictment knowingly possessed with the intent to distribute cocaine;

Second, the person was a member of the conspiracy charged in Count I of the

indictment;

Third, the person distributed cocaine in furtherance of the conspiracy; and

Fourth, the defendant was a member of the same conspiracy.

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,	CR90-428-TUC-RMB
Plaintiff,	INDICTMENT
vs.	
OSCAR BARNETT-INCLAN, BASILIO ANGULO-RUIZ SYLVIA VASQUEZ-CHAN, JULIA GAXIOLA-CASTILLO, SAMUEL ORTIZ ESPINOSA, MARCOS CRUZ-MENDOZA,	
Defendants.	

THE GRAND JURY CHARGES:

COUNT 1

That on or about September 26, 1990 to and including October 11, 1990, at or near Tucson, in the District of Arizona, OSCAR BARNETT-INCLAN, BASILIO ANGULO-RUIZ, SAMUEL ORTIZ ESPINOSA and MARCOS CRUZ-MENDOZA, named herein as defendants and co-conspirators, did knowingly and

intentionally combine, conspire, confederate, and agree together and with each other, and with other persons unknown to the grand jury to possess with intent to distribute a quantity of cocaine, a Schedule II controlled substance, of 5 kilograms or more; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A)(ii)(II).

All in violation of Title 21, United States Code, Section 846.

COUNT 2

That on or about September 26, 1990, at or near Tucson, in the District of Arizona, OSCAR BARNETT-INCLAN, BASILIO ANGULO-RUIZ, SAMUEL ORTIZ ESPINOSA and MARCOS CRUZ-MENDOZA did knowingly and intentionally possess with the intent to distribute and aid, abet, counsel, command, induce, procure, and casue others or another to possess with intent to

distribute a quantity of cocaine, a Schedule II controlled substance, of 500 grams or more but less than 5 kilograms; in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(ii)(II), and Title 18, United States Code, Section 2.